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Note

CROSSPOLLINATION OF SAME-SEX PARENTAL RIGHTS POST-DOMA: THE SUBTLE SOLUTION

DAVE WOODS

In the summer of 2013, the United States Supreme Court, to great fanfare, struck down the central provision of the seventeen-year-old Defense of Marriage Act (“DOMA”). Yet a second DOMA provision, denying full faith and credit for same-sex marriages, was not overturned, meaning individual states remain free to ban and refuse recognition for same-sex unions. As a result, the parental rights of same-sex spouses who move into anti-marriage-equality states may be imperiled. This Note argues, however, that even when same-sex marriages are not supported within a jurisdiction, parental rights emanating from those marriages will be supported.

Surveying case law from states across the country to show that statutory and common-law mechanisms work to preserve the parental rights and responsibilities of members of same-sex unions, this Note goes on to suggest that broad societal recognition of children’s need for parents outweighs state-by-state positions on gay marriage. Hence, same-sex civil rights are subtly being advanced nationwide by the day-to-day decisions of state family courts. A migration of same-sex family law rights from marriage-equality states into mini-DOMA states appears to be under way, a process that gay-rights advocates can encourage as a subtle solution to the anti-LGBT policy still prevailing in a majority of U.S. jurisdictions.

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CROSSPOLLINATION OF SAME-SEX PARENTAL RIGHTS POST-DOMA: THE SUBTLE SOLUTION

DAVE WOODS*

“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

—Justice Louis D. Brandeis¹

I. INTRODUCTION

The Supreme Court’s decision in *United States v. Windsor*² was celebrated by progressive legal activists for its invalidation of the Defense of Marriage Act (“DOMA”).³ Crucially, the *Windsor* Court declared section 3 of that Act, which for nearly seventeen years had precluded federal recognition of gay marriage,⁴ to be unconstitutional.⁵ Yet section 2 of the Act, which enshrined state choice-of-law treatment for same-sex relationships,⁶ remains in effect.⁷ In line with that section, a plethora of states have enacted so-called “mini-DOMAs,” state statutes and/or constitutional amendments prohibiting same-sex marriages and refusing to honor such marriages conducted in other states.⁸ Prior to *Windsor*, thirty-five states banned same-sex marriage—three by constitutional amendment, five by state law, and twenty-seven by both.⁹ Post-*Windsor*, two states,

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¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

² 133 S. Ct. 2675 (2013).

³ *Windsor*, 133 S. Ct. at 2695–96; *see also* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2012)).

⁴ *See* 1 U.S.C. § 7 (restricting federal recognition of marriage to unions of one woman and one man), *invalidated by Windsor*, 133 S. Ct. 2675.

⁵ *Windsor*, 133 S. Ct. at 2695–96.

⁶ *See* 28 U.S.C. § 1738C (denying full-faith-and-credit interstate treatment for “a relationship between persons of the same sex”).

⁷ *Windsor*, 133 S. Ct. at 2682–83.

⁸ *See* Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265–68 (2007) (reviewing the history of mini-DOMAs and delineating their varieties).

⁹ *See* Fernanda Santos, *New Mexico Justices to Rule on Gay Marriage*, N.Y. TIMES, Oct. 23, 2013, at A14 (confirming that thirty-five states banned same-sex marriage as of October 2013, before

Illinois and Hawai‘i, have adopted gay marriage legislatively,¹⁰ and one state, New Mexico, has adopted it by judicial fiat,¹¹ leaving thirty-three states that continue to mount mini-DOMA regimes.¹²

The ongoing result of these mini-DOMAs is that same-sex couples, including those legally married in any of the seventeen states that permit gay marriages, may not be able to receive the legal benefits of marriage if they enter mini-DOMA jurisdictions.¹³ To defenders of traditional marriage, this disparity reflects the very state individuality evoked in the Brandeis epigraph, with local populations properly defining their own civil rights and procedures.¹⁴ For marriage-equality activists, the bifurcated situation harkens back to a *Dred Scott*-like environment of progressive and recalcitrant regions in mutual strife.¹⁵ For lesbian/gay/

legalization by New Mexico, Hawai‘i, and Illinois); see also *Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last visited Mar. 13, 2014) (showing same-sex-marriage policy statuses of all fifty states and effective dates of relevant laws).

¹⁰ See Derrick DePledge, *Judge’s Decision Clears Way for Gay Marriages*, HONOLULU STAR-ADVERTISER, Nov. 15, 2013, at A1 (chronicling the passage of a marriage-equality law in Hawai‘i and a critical subsequent state court’s ruling that the new law did not violate a 1998 marriage-defining amendment to the Hawai‘i constitution); Monique Garcia & Ray Long, *Lawmakers Affirm Gays’ Right to Wed: Illinois Is Set to Join 14 Other States*, CHI. TRIB., Nov. 6, 2013, at 1 (announcing the repeal of Illinois’ mini-DOMA law despite a “year in which prospects for gay marriage often were dim”). Hawai‘i had briefly allowed same-sex marriage in the window between December 1996 and December 1999, before the passage of a constitutional amendment re-validated a previously struck-down marriage-limiting statute. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *21–22 (Haw. Cir. Ct. Dec. 3, 1996) (declaring denial of marriage licenses to same-sex couples a violation of Hawai‘i Constitution’s equal protection clause); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1076 (D. Haw. 2012) (tracing the history of same-sex marriage in Hawai‘i, including an “unpublished summary disposition” from the state supreme court holding that the 1998 amendment rendered challenges to state same-sex marriage restrictions “moot”).

¹¹ When the federal DOMA fell, New Mexico had neither approved nor banned same-sex marriage, the only state not to have taken a position. See Santos, *supra* note 9 (describing same-sex matrimony as an issue the New Mexico legislature “failed to resolve” and the governor “avoided”). The New Mexico Supreme Court legalized same-sex marriage on December 19, 2013, in a unanimous ruling. *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); see also Cindy Carcamo, *New Mexico Joins 16 States, D.C. to Make Same-Sex Marriage Legal*, PITTSBURGH POST-GAZETTE, Dec. 20, 2013, at A3 (explaining the ruling and its effects).

¹² See Masuma Ahuja & Emily Chow, *Same-Sex Marriage Status in the U.S.*, WASH. POST POL., <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/> (last visited Mar. 13, 2014) (tracking ongoing changes in same-sex marriage and union policy in the United States). The numbers and state statuses provided in this Note are accurate at the time of its publication; online sources such as Ahuja & Chow’s provide routinely updated information as the legal landscape changes.

¹³ Koppelman, *supra* note 8, at 265–66.

¹⁴ See Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253, 278 (2006) (discussing gay marriage as a moral issue that DOMA supporters believe demands state-by-state regulation under the Tenth Amendment).

¹⁵ See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 394 (1857) (ruling that one state’s elevating a person’s status does not “entitle him to . . . any of the privileges and immunities of a citizen in another state”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see also Robert A. Burt, *Overruling Dred Scott: The Case for Same-Sex Marriage*, 17 WIDENER L.J. 73, 90 (2007)

bisexual/transsexual (“LGBT”) activists, then, securing and enjoying the privileges of marriage irrespective of state borders may be the next legal hurdle. Yet even as that campaign accelerates, there is reason to believe that in the battle over one of the most crucial legal effects of marriage—its role in child-custody and child-support rights and obligations—same-sex-marriage proponents are already winning.

This Note argues that even in a mini-DOMA state, child-custody or -support doctrines and statutory provisions that empower same-sex partners may already be firmly in place. Part II of the Note will trace the history of child rearing as a court-recognized right and benefit of marriage. Part III will demonstrate that, historically, doctrines based on psychological or implied parentage and/or parentage ascertained by equitable or promissory estoppel may provide a means for LGBT parents—particularly those emerging from divorces and break-ups—to maintain their parental rights, even without access to the marriage institution. Part IV will examine a federal statute, the Parental Kidnapping Prevention Act¹⁶ (“PKPA”), which exists to force states to grant one another full faith and credit for child-support and -visitation orders. Part V will apply the implied-parentage and PKPA dynamics in analyzing three geographically and culturally disparate mini-DOMA exemplar states—Illinois, Montana, and Alabama—to examine their evolving positions on the parental rights of members of same-sex couples. Finally, Part VI will conclude that, ironically, there may be rights derived from same-sex marriages that state statutory and common law protect even in states that explicitly refuse to countenance same-sex unions. It will suggest that the crosspollination of same-sex, family law rights from marriage-equality states into mini-DOMA states is well under way and should be fostered by gay-rights advocates as a subtle solution to the continuing presence of anti-LGBT policy in the majority of U.S. jurisdictions.

II. MARRIAGE AND THE RIGHT TO PRODUCE AND RAISE CHILDREN

Bringing forth children and holding them out to the community as one’s own has long been a key benefit and oft-repeated underpinning of state-sanctioned marriage. In fact, courts have often seemed eager to say that procreation is the *ab initio* reason that marriage exists.¹⁷ As far back

(considering the Thirteenth and Fourteenth Amendments’ effects on the *Dred Scott* era and championing their similar application to same-sex issues today).

¹⁶ 28 U.S.C. § 1738A (2012).

¹⁷ See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (exalting procreation as the key underpinning of marriage by stating that “a decision to marry and raise [a] child in a traditional family setting must receive equivalent protection” to abortion rights); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (indicating that “[m]arriage is . . . fundamental to our very existence and survival”).

as the 1888 case of *Maynard v. Hill*,¹⁸ the United States Supreme Court stated that the “public is deeply interested” in marriage, as it forms the “foundation of the family.”¹⁹ The *Maynard* Court concluded that without marriage there “would be neither civilization nor progress.”²⁰ The implication that marriage is essential to procreation and survival²¹ was even more evident half a century later when the Supreme Court declared, “Marriage and procreation are fundamental to the very existence and survival of the race.”²² Finally, over thirty years later, the Court held that the “decision to marry and raise [a] child in a traditional family setting must receive equivalent protection” to the privacy rights undergirding abortion.²³

This seminal jurisprudence on marriage and the family survives in the courts deciding today’s gay-marriage controversies. Upholding Nebraska’s constitutional mini-DOMA, for example, the United States Court of Appeals for the Eighth Circuit found “steering heterosexual procreation into marriage” to be a purpose so valid that it “negate[d] any suspicion that the supporters of [the mini-DOMA] were motivated solely by a desire to punish disadvantaged groups.”²⁴ The Texas Court of Appeals found that marriage laws favoring traditional couples did not violate equal protection as heterosexuals alone possessed the “natural ability to procreate.”²⁵ Similarly, in attempting to restrict marriage to “male-female couples”²⁶ and exorcise the judiciary’s ability to change that definition, the Hawai’i legislature passed a law in 1994 stating that the state’s marriage licenses were “intended to foster and protect the propagation of the human race through male-female marriages.”²⁷ Justice Scalia even specified his concern over the “consequences of raising a child in a single-sex family” during oral arguments in *Hollingsworth v. Perry*,²⁸ the gay-marriage case that accompanied *Windsor* during the 2013 term.

The link between marriage and children has quite frequently been

¹⁸ 125 U.S. 190 (1888).

¹⁹ *Id.* at 211. In *Loving v. Virginia*, the Court cited *Maynard* to conclude that marriage was too vital and fundamental a right to be frustrated by racial discrimination. 388 U.S. at 12.

²⁰ 125 U.S. at 211.

²¹ See, e.g., Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIPIAC L. REV. 447, 451 (2004) (citing the *Maynard* Court’s words as making the connection between marriage and procreation “axiomatic”).

²² *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541 (1942).

²³ 434 U.S. 374, 386 (1978).

²⁴ *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 869 (8th Cir. 2006).

²⁵ *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 674 (Tex. Ct. App. 2010).

²⁶ A Bill for an Act Relating to Marriage, 1994 Haw. Sess. Laws 217, *repealed by Hawaii Marriage Equality Act of 2013*.

²⁷ *Id.* at 529.

²⁸ Oral Argument at 22:05, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), available at http://www.oyez.org/cases/2010-2019/2012/2012_12_144.

asserted as an argument against legalized same-sex unions. Campaigning in 2006 for a constitutional DOMA on the federal level, President George W. Bush declared that “changing the definition of marriage would undermine the family structure.”²⁹ In the same year, then Senate majority leader Bill Frist argued that “[m]arriage between one man and one woman does a better job protecting children, better than any other institution humankind has devised.”³⁰ The president of the Marriage Law Foundation, a traditional-marriage-defense group formed on the one-year anniversary of Massachusetts’ adoption of same-sex marriage in 2003,³¹ wrote in 2008 that “married mother-father child-rearing [is the] mode that indisputably correlates with the optimal outcomes” for children and society.³²

Indeed, DOMA itself was ostensibly engendered by precisely such concerns. A 1996 House of Representatives committee report on House Resolution 3396, which was soon to be cast into law as DOMA, explains that society has “an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.”³³ Not to be misread, the report implores that “it is not the mere presence of love that explains marriage” but the fact that “marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children.”³⁴ DOMA was born—as, no doubt, were the mini-DOMAs—out of the deep legal and social connections between parental rights and the institution of marriage.

Hence, one reason that homosexual citizens might seek to challenge traditional marriage restrictions is to secure the right to bring forth and raise children. Reviewing the long-standing legal, political, and social identification of child-rearing and marriage, a corollary principle seems to exist: one who secures the right to bring forth and raise children also gains a key portion of the right to marry.

III. IMPLIED PARENTAGE AND ESTOPPEL IN CHILD CUSTODY

The preceding Part shows that jurists, politicians, and commentators have an affinity for clear biological parent-child relationships. The elegance in child-custody law derived from such relationships cannot be

²⁹ Deb Riechmann, *Bush Pushes Amendment Banning Gay Marriage: Has Little Chance to Pass, but Will Be Used to Rally Conservatives*, CHI. SUN-TIMES, June 5, 2006, at 23.

³⁰ Laurie Kellman, *Bush Steps Up Same-Sex Fight*, GLOBE & MAIL (Can.), June 6, 2006, at A14.

³¹ *About the Foundation*, MARRIAGE L. FOUND., <http://www.marriagelawfoundation.org/board.html> (last visited Mar. 13, 2014).

³² Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL’Y 313, 352 (2008).

³³ H.R. REP. NO. 104-664, at 13 (1996).

³⁴ *Id.* at 13–14.

denied: he or she who physically creates children is responsible for them and has fundamental rights over them. While same-sex marriage and parenting may appear to upend this traditional biology-based doctrine, plunging family law into chaos, a measured review of case law from across the country suggests that since long before the controversies of the DOMA era, biology has not been a controlling, or even necessary, substructure of child-custody jurisprudence. Despite the vehement legal and political defenses of marriage as a vehicle for creating children, child custody has been no more reserved for married people than has procreation itself.

Since gay citizens in mini-DOMA states cannot obtain parental rights through marriage or, often, adoption,³⁵ courts must grapple with the issue of whether and how to assign parentage over children emerging from same-sex households. This problem may seem novel to some, but the essentials of the issue existed at least as far back as the emergence of artificial-insemination technology in the late nineteenth century.³⁶ By the early 1950s, babies had been artificially conceived and delivered using the frozen sperm of deceased fathers, inevitably raising parentage questions.³⁷ Since the advent of such possibilities, courts have routinely had to fashion parentage doctrines without traditional biological or statutory guideposts directing them. In 1963, for example, Stanley Gursky, a New York husband divorcing his wife, asked a court to declare that his marriage had produced no issue though his wife had given birth to a daughter conceived by artificial insemination with donor sperm.³⁸ Despite insisting that a child so conceived was illegitimate, the court held the husband liable for the child's support under an equitable-estoppel theory: the wife had "changed her position to her detriment" based on her husband's "consent" to the insemination,³⁹ creating an "implied contract to support."⁴⁰ Forty-eight

³⁵ These states include Mississippi, Utah, Kentucky, Nebraska, North Carolina, Ohio, and Wisconsin. See MISS. CODE ANN. § 93-17-3(5) (2004) (stating "[a]doption by couples of the same gender is prohibited"); UTAH CODE ANN. § 78B-6-117(3) (2012) (barring adoption by anyone "cohabitating in a relationship that is not legally valid" in Utah, such as a same-sex relationship); S.J.L.S. v. T.L.S., 265 S.W.3d 804, 836 (Ky. Ct. App. 2008) (barring adoption of child by a parent's same-sex partner); *In re Adoption of Luke*, 640 N.W.2d 374, 383 (Neb. 2002) (same); *Boseman v. Jarrell*, 704 S.E.2d 494, 505 (N.C. 2010) (same); *In re Adoption of Jane Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) (same); *In re Interest of Angel Lace M.*, 516 N.W.2d 678, 680, 686 (Wis. 1994) (same).

³⁶ The first medically conducted artificial insemination in the United States apparently occurred in Philadelphia in 1884 when a Professor Pancoast inseminated the (unconscious and unwitting) wife of an infertile wealthy merchant with semen collected from a medical student. *Artificial Insemination*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/37134/artificial-insemination> (last visited Mar. 13, 2014).

³⁷ Kara W. Swanson, *The Birth of the Sperm Bank*, 71 ANNALS OF IOWA 241, 241 (2012).

³⁸ *Gursky v. Gursky*, 242 N.Y.S.2d 406, 408 (Sup. Ct. 1963).

³⁹ *Id.* at 412.

⁴⁰ *Id.*

years before same-sex marriage would become legal in New York,⁴¹ a New York court had declared a non-biological, non-adoptive parent legally responsible for a child based solely on that parent's express wish to take on that role.

The *Gursky* court was clearly concerned about holding actors accountable for their promises to serve as parents.⁴² That concern reverberates through similar cases in the years that follow, as does the similar solution of implying parenthood where it may not be, under traditional definitions, obvious. In 1968, the California Supreme Court sustained the criminal conviction for nonsupport of a man who had consented to the artificial insemination of his wife.⁴³ Eleven years later, a California appellate court estopped a putative parent from denying he was a six-year-old boy's father after he had "intended [the boy] to accept and act upon such representation."⁴⁴ The trend continues in 2013: upon a trial court's finding that a divorcing father "knowingly and voluntarily consent[ed]" to artificial insemination, the Indiana Court of Appeals recently held the man liable to support the children of his marriage.⁴⁵ This estoppel-type approach has even been applied to hold *both* spouses legally responsible after they employed a surrogate mother to bring forth a child genetically related to neither of them.⁴⁶ The sole member of the triad not held legally responsible was the surrogate, the only person biologically related to the child.⁴⁷

It bears noting that mini-DOMA states are represented in the list of jurisdictions willing to assign parentage without a showing of biological or adoptive liability. In 1987, South Carolina's highest court confirmed that a husband's "knowledge of and assistance in" his wife's insemination made him the legal father of the offspring resulting.⁴⁸ In Arkansas, given his consent to insemination and his wife's detrimental reliance on it, a husband was estopped from denying the children of his marriage.⁴⁹ A husband in

⁴¹ Same-sex marriage became legal in New York State in 2011. See Marriage Equality Act, 2011 N.Y. Sess. Laws 95 (A. 8354) (McKinney) (defining marriage as valid between parties of "the same or different sex").

⁴² 242 N.Y.S.2d at 412.

⁴³ *People v. Sorensen*, 437 P.2d 495, 497, 501–02 (Cal. 1968).

⁴⁴ *In re Marriage of Johnson*, 152 Cal. Rptr. 121, 123–24 (Ct. App. 1979).

⁴⁵ *Engelking v. Engelking*, 982 N.E.2d 326, 328–29 (Ind. Ct. App. 2013).

⁴⁶ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282, 294 (Ct. App. 1998).

⁴⁷ *Id.* at 288, 288 n.12.

⁴⁸ *In re Baby Doe*, 353 S.E.2d 877, 879 (S.C. 1987). South Carolina is a mini-DOMA state that prohibits same-sex marriage under its constitution and by statute. See S.C. CONST. art. XVII, § 15 (declaring that heterosexual marriage is "the only lawful domestic union" in South Carolina); S.C. CODE ANN. § 20-1-15 (1996) (declaring same-sex marriages "void ab initio").

⁴⁹ *Brown v. Brown*, 125 S.W.3d 840, 844 (Ark. Ct. App. 2003). Arkansas is a mini-DOMA state that prohibits same-sex marriage under its constitution and by statute. See ARK. CONST. amend. 83, § 1 ("Marriage consists only of the union of one man and one woman."); *id.* 83, § 2 (allowing recognition of out-of-state heterosexual common-law marriages but denying recognition to any other out-of-state

Kansas was estopped from evading parentage after giving artificial-insemination consent to his wife's physician,⁵⁰ and an Oregon man failed to sway an appeals court that his consent to insemination should not be binding if it had not been reduced to writing.⁵¹

Finally, estoppel doctrine has been employed in cases similar to those above but by the opposite parties: husbands who have held themselves out as fathers of children not their genetic offspring, who sought nonetheless to establish parental rights. As early as 1948, a New York trial court refused a wife's request to deny visitation for her separated husband to their child born of artificial insemination.⁵² The court reasoned that the husband's consent to the procedure involved the same custody considerations as that of an adoptive parent.⁵³ Twenty-five years later, a New York court again bolstered the rights of non-biological parents by declaring that the consent of an ex-husband who was genetically unrelated to his ex-wife's daughter was nevertheless required prior to the adoption of that daughter by another man.⁵⁴

These cases show that in states both red and blue, in mini-DOMA and marriage-equality jurisdictions alike, courts have made establishing parentage a priority. The dual judicial imperatives of providing the best possible care for the child and avoiding the appearance on state-support rolls of parentless waifs are simultaneously served each time a prospective parent is estopped from denying her or his non-biological child. As these cases suggest, these dual imperatives have the power to trump traditional morality, religious instruction, individual liberty, and state statutory law to create non-traditional parents when and where such parents serve state interests. This dynamic can also be reversed to empower parents to establish non-traditional custody over their purported children. In each of

quasi-marital unions); ARK. CODE ANN. § 9-11-208 (1997) (statutorily banning same-sex marriage and preempting recognition of same-sex marriages from other states).

⁵⁰ *R.S. v. R.S.*, 670 P.2d 923, 925, 928 (Kan. Ct. App. 1983). Kansas is a mini-DOMA state that prohibits same-sex marriage under its constitution and by statute. See KAN. CONST. art. XV, § 16 (declaring all marriages other than one man to one woman "contrary to the public policy" and "void"); KAN. STAT. ANN. § 23-2501 (2007) (defining marriage as between parties "of opposite sex"); see also *Id.* § 23-2508 (declaring full faith and credit for all valid out-of-state marriages in its first sentence but then precluding recognition of any similarly valid same-sex union in its second).

⁵¹ *In re Marriage of A.C.H. & D.R.H.*, 210 P.3d 929, 933 (Or. Ct. App. 2009). Oregon is a mini-DOMA state that prohibits same-sex marriage under its constitution. OR. CONST. art. XV, § 5a ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."). However, as of late 2013, Oregon does recognize same-sex marriages certified in other states, making its mini-DOMA perhaps the weakest in the nation. See Scott Hewitt, *Same-Sex Oregon Couples Flock to Clark County to Wed*, COLUMBIAN, Nov. 24, 2013, <http://www.columbian.com/news/2013/nov/24/gay-same-sex-marriage-Oregon-Clark-County/> (documenting same-sex Oregon couples' marrying out-of-state to secure in-state recognition).

⁵² 78 N.Y.S.2d 390, 390-91 (Sup. Ct. 1948).

⁵³ *Id.*

⁵⁴ *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

these cases, as in the cases of many same-sex partners seeking child custody in mini-DOMA states today, neither genetics nor adoption established parentage. Still, courts inferred a parental relationship from circumstances—circumstances very similar to those in the dissolutions of same-sex unions occurring every day in post-DOMA/mini-DOMA America.

IV. THE PARENTAL KIDNAPPING PREVENTION ACT AND FULL FAITH AND CREDIT

Article IV of the U.S. Constitution requires that each state afford meaning and enforcement—full faith and credit—to the judicial proceedings of every other state.⁵⁵ Still, the U.S. Supreme Court has long held that only a “final judgment . . . qualifies for recognition throughout the land.”⁵⁶ Yet the almost universal parlance for a motion addressing the custody of a child is a modification: it is axiomatic that as children grow and circumstances evolve, a change in custody conditions may be needed to protect the child’s best interests. Since child-custody/visitation orders are, therefore, never final, they had escaped the full-faith-and-credit requirement until, in *Thompson v. Thompson*,⁵⁷ the Supreme Court noted that by 1980, as many as 100,000 children may have been kidnapped by non-custodial parents and transported into friendlier jurisdictions.⁵⁸ As Professor Roger Baron acknowledged, “The losing party in the custody litigation would much prefer to avoid having a modification hearing before the same court which has once already ruled in favor of the opposing side.”⁵⁹

Congress, which is empowered to dictate the terms of full faith and credit,⁶⁰ responded with a federal act to curb the “national epidemic of parental kidnapping.”⁶¹ The Parental Kidnapping Prevention Act of 1980 (“PKPA”), was enacted with a provision entitled “Full Faith and Credit Given to Child Custody Determinations.”⁶² The Act intones that only one

⁵⁵ U.S. CONST. art. IV, § 1.

⁵⁶ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

⁵⁷ 484 U.S. 174 (1988).

⁵⁸ *Id.* at 181.

⁵⁹ Roger M. Baron, *Child Custody Jurisdiction*, 38 S.D. L. REV. 479, 485 (1993).

⁶⁰ U.S. CONST. art. IV, § 1.

⁶¹ *Thompson*, 484 U.S. at 180–81.

⁶² Pub. L. No. 96-611, § 8, 94 Stat. 3568, 3569 (codified at 28 U.S.C. § 1738A (2012)). The PKPA had been preceded by the Uniform Child Custody Jurisdiction Act (UCCJA), a model state law recommended by, among others, the American Bar Association. Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1207 n.1 (1969). The UCCJA’s slow, piecemeal adoption by state legislatures rendered it largely ineffective as a uniform standard. The PKPA was intended to create the single American standard the UCCJA had failed to engender. Linda M. DeMelis, Note, *Interstate*

state—the home state of an affected child—can rule on custody, disallows minimum-contacts attempts to get around this pronouncement, and requires that courts outside the child’s home state fully honor the custody decrees of the home state.⁶³ While doubts exist about the precise effectiveness of the PKPA,⁶⁴ its essential success in preempting state law to establish a single controlling forum for each custody case has been clear for decades.⁶⁵

Thanks to the success of the PKPA, one essential element of marriage—child custody—is afforded national, uniform enforcement that marriage rights themselves are not. While regulatory issues such as the delineation of incest, the age of consent, and pre-remarriage waiting periods have kept marriage squarely within the public-policy exception to the full faith and credit clause,⁶⁶ the PKPA wrenches child custody out of that exception and prevents a state from choosing to apply its own law over those of other states that have already made a valid custody adjudication. Most mini-DOMAs are, at heart, state choice-of-law provisions rejecting the marital experiments of other states. A law such as the PKPA, which in one stroke denies state choice of law and touches directly on an issue as deeply embedded in marriage policy as child custody, is therefore capable of sending significant shudders through state same-sex parenting jurisprudence in mini-DOMA fiefs.

The PKPA’s effects have been clearly demonstrated in Virginia, a mini-DOMA battleground.⁶⁷ By a strong margin, Virginians voted to add an amendment banning same-sex marriage to their state constitution in 2006.⁶⁸ Given the judicial adoption of gay marriage in Massachusetts three

Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard, 45 HASTINGS L.J. 1329, 1330 (1994).

⁶³ See DeMelis, *supra* note 62, at 1336 (explicating the strictures of the PKPA).

⁶⁴ See *id.* at 1330 (suggesting the PKPA is a “[q]ualified [s]uccess” though states continue to “differ in their interpretations of [its] jurisdictional rules”).

⁶⁵ See, e.g., Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 912 (1993) (claiming that the PKPA worked “wonderfully well” in establishing full faith and credit for custody decrees).

⁶⁶ See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1969–70 (1997) (reviewing the exception as applied to marriage and states’ occasional refusals to recognize one another’s marriages).

⁶⁷ For examples beyond the Virginia cases discussed here where the PKPA was used in state choice-of-law situations, see *Perez v. Tanner*, 965 S.W.2d 90, 95 (Ark. 1998); *Cann v. Howard*, 850 S.W.2d 57, 60 (Ky. Ct. App. 1993); *Atkins v. Atkins*, 623 So.2d 239, 243 (La. Ct. App. 1993); *Potter v. Potter*, 505 S.E.2d 147, 152 (N.C. Ct. App. 1998); *State ex rel Kasper v. Kasper*, 792 P.2d 118, 130 (Utah Ct. App. 1990); *Larry R.W. v. Alan F.S. (In re Custody of Kit S.)*, 537 N.W.2d 30, 32–33 (Wis. Ct. App. 1995).

⁶⁸ VA. CONST. art. I, § 15-A; see also Chris L. Jenkins, *Ban on Same-Sex Unions Added to Va. Constitution*, WASH. POST, Nov. 8, 2006, at A46 (explaining that the Virginia constitutional ban “passed easily”).

years earlier,⁶⁹ the ballot measure was largely supported as a means of insulating the state's statutory mini-DOMA, which had existed since 1997 and was augmented with a second statute in 2004, from judicial review.⁷⁰ Virginia's resulting mini-DOMA was particularly strict: it not only banned same-sex marriages and civil unions and disallowed their recognition when created in other states, but it further specified that any contractual rights devolving from such unions would be void within Virginia's borders.⁷¹ On the very day this enhanced 2004 mini-DOMA statute became law, a mother fleeing a same-sex relationship in Vermont filed a petition in a Virginia trial court to have her former partner stripped of any parental rights,⁷² pitting the new mini-DOMA against the PKPA.

This story began in Falls Church, Virginia, where Lisa Miller and Janet Jenkins met and started a romantic relationship in 1997.⁷³ Three years later, they entered a civil union in Vermont, melded their family names (hence, the Virginia case is *Miller-Jenkins v. Miller-Jenkins*⁷⁴), and decided to start a family via artificial insemination.⁷⁵ With Jenkins' participation and support, Miller gave birth to a daughter and the couple moved to Vermont full time so that they could raise the child in a state that endorsed their relationship.⁷⁶ About one year later, when the couple separated, a Vermont court issued an initial order granting physical custody over the daughter to Miller and visitation to Jenkins.⁷⁷ Less than one month later, Miller took the child back to Virginia and filed a request to render any custody claims by Jenkins "nugatory, void, illegal, and/or unenforceable,"⁷⁸ echoing the language of the state's just-enacted 2004

⁶⁹ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); see also Tasha Robertson & Steve Friess, *Gay Marriage Decision Spurs Action Across U.S.*, BOS. GLOBE, Nov. 28, 2003, at A1 (noting that the "ripple effect" of the Massachusetts decision was "being felt from Arizona to Wisconsin, from New Jersey to Nevada").

⁷⁰ See Chris L. Jenkins, *As Campaign Days Dwindle, Marriage Issue Heats Up in Va.*; *N.J. Ruling Sparks Action on Amendment Question*, WASH. POST, Oct. 28, 2006, at B01 (noting that "supporters say the amendment is necessary to protect against activist judges" such as those "in Massachusetts in 2003"); Jenkins, *supra* note 68 (suggesting that statutes prohibiting gay unions were seen by traditional-marriage supporters as insufficient to prevent judicial action allowing same-sex unions in Virginia); see also VA. CODE ANN. § 20-45.2 (1997) (banning same-sex marriages and disallowing recognition of such marriages from other states); *id.* § 20-45.3 (2004) (banning all same sex-sex unions, partnerships, or similar arrangements and voiding all effects of such unions irrespective of their state of origin).

⁷¹ VA. CODE ANN. §§ 20-45.2 to .3; Jenkins, *supra* note 68.

⁷² *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006).

⁷³ Erik Eckholm, *Which Mother for Isabella? Civil Union Ends in an Abduction and Questions*, N.Y. TIMES, July 29, 2012, at A1.

⁷⁴ *Miller-Jenkins*, 637 S.E.2d at 330.

⁷⁵ Eckholm, *supra* note 73.

⁷⁶ *Id.*

⁷⁷ *Miller-Jenkins*, 637 S.E.2d at 332.

⁷⁸ *Id.*

mini-DOMA.⁷⁹ The Virginia trial court conceded, declaring Miller the girl's "sole biological and natural parent."⁸⁰

Still, the Vermont courts persisted in their claim of jurisdiction, invoking the PKPA and repining of Virginia's statutory incapacity to decide issues arising out of a civil union.⁸¹ Defending her position before the Virginia Court of Appeals, Miller specifically made Section 2 of the federal Defense of Marriage Act—the states'-powers provision that remains in place today⁸²—the centerpiece of her argument, claiming that DOMA "effectively trump[ed] the PKPA."⁸³ The court roundly rejected this argument, ruling that DOMA did not repeal the PKPA, did not conflict with the PKPA, and did nothing to disturb a custody order properly executed by an out-of-state court.⁸⁴ As to Virginia's 2004 mini-DOMA bar of rights derived from out-of-state same-sex relationships, the court curtly held that the mini-DOMA either did not apply or was "preempted by the PKPA."⁸⁵ Virtually from its beginning, then, one of the most drastic anti-same-sex-rights statutes in the country was unable to undermine an out-of-state custody decision based on a same-sex-union statute. Janet Jenkins could not have married Lisa Miller in Virginia, but she was able to assert her parental rights over Miller's biological offspring there with the full support of the local appellate courts.

From the point of view of marriage-equality activists, a case like *Miller-Jenkins* is compelling for the headlines it can generate, but it is perhaps most important for its subtle precedential effects. There is evidence of such effects in the 2009 Virginia Court of Appeals decision in *Prashad v. Copeland*.⁸⁶ The case was a child-custody dispute between a gay couple, to whom a North Carolina court had granted primary custody,⁸⁷ and the surrogate who had given birth to their child in Minnesota.⁸⁸ The surrogate, who was in a heterosexual marriage, attempted to challenge the North Carolina order in Virginia, relying in part on identical arguments to those made by Lisa Miller: that DOMA "trumps the PKPA" and that Virginia's 2004 mini-DOMA prevents recognition of

⁷⁹ See VA. CODE ANN. § 20-45.3 ("Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.").

⁸⁰ *Miller-Jenkins*, 637 S.E.2d at 332.

⁸¹ *Id.* at 333. The parallel Vermont case is *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

⁸² See *supra* note 7 and accompanying text (stating full-faith-and-credit interstate treatment for same-sex marriages not required under the remaining federal DOMA provisions).

⁸³ *Miller-Jenkins*, 637 S.E.2d at 336.

⁸⁴ *Id.* at 337.

⁸⁵ *Id.*

⁸⁶ 685 S.E.2d 199 (Va. Ct. App. 2009).

⁸⁷ *Id.* at 201–02.

⁸⁸ *Id.* at 201.

the couple's custody decree.⁸⁹ The court sidestepped the invitation altogether, holding that it in no way needed to recognize the marriage to recognize the child custody created in North Carolina.⁹⁰

In sum, in 2006, the Virginia Court of Appeals used the PKPA to uphold the visitation rights of a lesbian parent to her partner's biological daughter. In 2009, the same statute led the court to confirm that two gay men have superior custody rights to those of their child's biological heterosexual mother. Thus, cases like *Prashad* and *Miller-Jenkins* demonstrate the PKPA's relevance as a tool in LGBT legal campaigns.

Janet Jenkins' legal victory was pyrrhic; her case ended in the abduction, transportation, and disappearance of her child.⁹¹ Such an ending casts light on the imperatives behind the PKPA, on society's collective wish to see children safely and civilly settled. Certainly, the decisions in *Miller-Jenkins v. Miller-Jenkins* and *Prashad v. Copeland* need not be interpreted as anything more than what settled law demanded.⁹² Possibly, however, the Virginia Court of Appeals' refusal, even in dicta, to take up the mantras of state sovereignty and traditional-marriage defense, and its clear willingness to sidestep those issues and allow the PKPA to function unfettered, shows an ordering of priorities in which the concern for children apparently outweighs concerns over their parents' lifestyles. Whether strictly in a legal sense or perhaps within a deeper social context, the PKPA serves to empower the members of same-sex relationships even where those relationships themselves have never been legally cognizable.

V. SAME-SEX PARENTAL RIGHTS IN THREE CONTRASTING MINI-DOMA STATES

This Note now turns to examine whether same-sex partners' parental rights have actually been bolstered by de facto parentage and PKPA

⁸⁹ *Id.* at 202, 206–07.

⁹⁰ *Id.* at 207.

⁹¹ Miller, who became a deeply religious conservative, repeatedly frustrated visitation, resulting in contempt convictions in the Vermont courts. Eckholm, *supra* note 73. In 2008, the United States Supreme Court denied certiorari in her fight against Vermont. *Miller-Jenkins v. Miller-Jenkins*, 555 U.S. 888, 888 (2008). In September 2009, she absconded with her daughter to a Mennonite settlement in Nicaragua. Eckholm, *supra* note 73. After the arrest of a pastor for his role in the kidnapping, Miller and the girl disappeared and are believed to be at large in Nicaragua still. *Id.* It may be tempting to say that this turn of events describes a need for greater equality in child-custody for same-sex relationships, but as both pro- and anti-marriage-equality state courts and the U.S. Supreme Court concurred in the enforcement, the resolution may be more a reflection of the sad reality of equality achieved, with a same-sex partner losing touch with her child not because of legal barriers but because of the legal system's incapacity to control events in the roiling seascape of intra-family law.

⁹² See, e.g., *Meade v. Meade*, 812 F.2d 1473, 1474, 1478 (4th Cir. 1987) (affirming that the PKPA trumps state law and mandating Virginia's continuing to control the case despite the mother's securing custody modifications from a North Carolina court).

applications in state case law. To answer that question from a broad perspective, three long-time mini-DOMA states that are geographically dispersed and culturally dissimilar are examined: Illinois, Montana, and Alabama. The anti-gay-marriage policies of these states, and the ways in which those policies have or have not resulted in changes to gay-parenting rulings in the state courts, raise questions about the capacity of any state in 2014 to embargo same-sex family rights completely.

A. Case Law and Statutory Developments in Illinois

Both geographically and politically, Illinois sits amidst the nation. Its demographics, political history, and civic culture defy simple red-blue classification. Political statisticians divide the state into three regions: Chicago/Cook County, the state's key population center and a Democratic stronghold; the "collar counties," five suburban jurisdictions ringing Chicagoland; and "downstate," an immense swath of territory comprising ninety-six counties, the southernmost of which are twice as close to Mississippi's borders as they are to Chicago's.⁹³ The dynamic pitting liberal-leaning, populous upstate counties against conservative-minded rural counties downstate has led to a historically purple jurisdiction: in the twenty years from 1968 to 1988, Illinois voted for the Republican candidate in every presidential election; in the two decades from 1992 onward, it has voted for the Democrat each time.⁹⁴

In accord with its conservative legacy, Illinois firmly rejected same-sex marriage. It passed three statutory mini-DOMA provisions in 1996, adding same-sex marriage to its enumerated list of prohibited marriages,⁹⁵ enacting a separate statute declaring same-sex marriage "contrary to the public policy of this State,"⁹⁶ and adding, as contemplated in the second section of the federal DOMA,⁹⁷ a component barring recognition in Illinois of same-sex marriages legally contracted in other states.⁹⁸ Perhaps characteristically given its lack of political orthodoxy, Illinois never cemented its mini-DOMA regime in a constitutional amendment. Still, the mini-DOMA was sufficiently strong to deny surviving-spouse inheritance

⁹³ Micah Cohen, *Political Geography: Illinois*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Mar. 20, 2012, 8:35 AM) http://fivethirtyeight.blogs.nytimes.com/2012/03/20/political-geography-illinois/?_php=true&type=blogs&_r=1.

⁹⁴ *Illinois Election Results*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/state.php?fips=17&off=99> (last visited Mar. 13, 2014).

⁹⁵ See 750 ILL. COMP. STAT. ANN. 5/212(a)(5) (West 1996) (prohibiting "a marriage between 2 individuals of the same sex").

⁹⁶ 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1996).

⁹⁷ See 28 U.S.C. § 1738C (2012) (denying full-faith-and-credit interstate treatment for same-sex marriages under federal DOMA).

⁹⁸ 750 ILL. COMP. STAT. ANN. 5/216 (West 1996) ("Prohibited marriages void if contracted in another state.").

rights to a same-sex partner after an eight-year committed relationship—foreshadowing the issues in *Windsor* that would lead to DOMA's demise in the summer of 2013.⁹⁹

The Illinois mini-DOMA also had a direct effect on child-custody issues. For instance, in *In re C.B.L.*,¹⁰⁰ a lesbian brought suit after being denied contact with her putative child since the end of an eleven-year relationship with the child's biological mother.¹⁰¹ Although the petitioner had participated "dutifully" in the artificial insemination, birth, and rearing of the child, the court found the petitioner had no basis on which to ask for visitation as she fit none of the categories listed in the state's marital statute.¹⁰² By the time she reached the appeals court, the petitioner had already given up any claim under the state's marriage laws and was pursuing a de facto parent-theory¹⁰³ of the sort that has worked in numerous cases to create parentage where biology and adoption were not available.¹⁰⁴ The Illinois Appellate Court rejected implied parentage as a strategy for advancing LGBT parental rights and ultimately supported the Illinois mini-DOMA.

Six years later, in *In re Marriage of Simmons*,¹⁰⁵ the same appeals court denied any basis for a child-custody petition to a transgender man who, though born female, had lived as a male his entire adult life, taken testosterone for decades, undergone partial sex-reassignment surgery, obtained an Illinois birth-certificate modification listing him as "male," and married a woman in a certified Cook County ceremony.¹⁰⁶ After six years, the couple mutually decided to have a baby via artificial insemination, and the petitioner was duly listed as the child's father on its birth certificate.¹⁰⁷ Despite the marriage, the clear implied-parentage arguments, and the evidence of the birth certificate, upon the couple's dissolution the court held that the petitioner was not a parent of the child, as he, a legal female,¹⁰⁸ had never actually been a husband.¹⁰⁹ While the Illinois Parentage Act¹¹⁰ gives a consenting husband full paternal rights over a

⁹⁹ *In re Estate of Hall*, 707 N.E.2d 201, 207–08 (Ill. App. Ct. 1998); see also *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁰⁰ 723 N.E.2d 316 (Ill. App. Ct. 1999).

¹⁰¹ *Id.* at 317.

¹⁰² *Id.* at 317, 320–21.

¹⁰³ *Id.* at 318.

¹⁰⁴ See *supra* Part III (tracing the use of estoppel and implied parentage to establish parental rights).

¹⁰⁵ 825 N.E.2d 303 (Ill. App. Ct. 2005).

¹⁰⁶ *Id.* at 306–07.

¹⁰⁷ *Id.* at 307.

¹⁰⁸ The Court referred to the petitioner throughout using male pronouns for, it said, "respect" and with "no legal significance." *Id.* at 306 n.1.

¹⁰⁹ *Id.* at 315.

¹¹⁰ 750 ILL. COMP. STAT. ANN. 40/1–40/3 (West 1992).

child created by artificial insemination, the court held it could not be applied to the petitioner.¹¹¹

Both facts and timing suggest the *Marriage of Simmons* Court may have ruled with an eye to preserving the heterosexual clarity in the language of the Illinois mini-DOMA. By the time the case was decided, the Illinois Supreme Court had already, in the 2003 case *In re Parentage of M.J.*,¹¹² faced a similar scenario involving a heterosexual couple. A man involved in a love affair with a woman gave his consent, encouragement, and support to her efforts to have a child by means of artificial insemination with donor sperm.¹¹³ When the procedure produced twins, the man initially supported the new family but, upon the couple's breaking up, stopped doing so.¹¹⁴ The case involved the mother's attempt to obtain child support—analogueous to the *Marriage of Simmons* petitioner's attempt to establish child visitation—based on the same Illinois Parentage Act.¹¹⁵ The court held that because the mother had failed to get the father's written consent to the artificial insemination, she could not mount a claim under the Act.¹¹⁶

It would appear, then, that the traditional couple and non-traditional couple were dealt with identically in that neither could succeed under the Act. But that reading overlooks two critical differences. First, the transgender petitioner in *Marriage of Simmons* in fact had executed written consent at a fertility clinic in full accord with the Parentage Act's strictures,¹¹⁷ yet still he was denied the parental status that would have been granted to the *Parentage of M.J.* petitioner had she possessed the same documentation. Second, the Illinois Supreme Court did not ultimately rule against the *Parentage of M.J.* petitioner. Despite finding that the Parentage Act did not advance the petitioner's claim, the court held that she could still pursue her case for child-support payments “based on common law theories of oral contract or promissory estoppel.”¹¹⁸ The state's high court took pains to show that the Parentage Act did not preclude implied-parent doctrine and that the legislature wanted the common law to continue establishing parentage whenever possible.¹¹⁹ Yet two years later, a lower court failed to offer this second-chance solution to

¹¹¹ *Marriage of Simmons*, 825 N.E.2d at 315.

¹¹² 787 N.E.2d 144 (Ill. 2003).

¹¹³ *Id.* at 146.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 147.

¹¹⁶ *Parentage of M.J.*, 787 N.E.2d at 150.

¹¹⁷ *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005).

¹¹⁸ *Parentage of M.J.*, 787 N.E.2d at 150, 152.

¹¹⁹ See *id.* at 151 (examining three sections of the Illinois Parentage Act and finding “nothing to prohibit common law actions to establish parental responsibility, and the state's public policy considerations support a finding in favor of allowing common law actions”).

the transgender *Marriage of Simmons* petitioner, as he resided in what that court considered a same-sex relationship.¹²⁰ Especially in contrast with *Parentage of M.J.*, the 2005 *Marriage of Simmons* decision shows not only the legal but possibly the prejudicial effects of a mini-DOMA that elevates some relationships and denies status to others.

Jurisprudence evolved. Ten years earlier—one year prior to the mini-DOMA’s enactment—the same court produced an opinion that was much friendlier to LGBT family rights in *In re Petition of K.M.* That court had interpreted Illinois’ adoption statutes liberally to allow “unmarried persons . . . regardless of sex or sexual orientation, to petition for adoption jointly.”¹²¹ This decision allowed two different lesbian couples to begin families under Illinois law pending hearings on whether the adoptions would have been in the best interests of the children.¹²² As these second-parent adoptions were sanctioned by the state, the same-sex partners were assured of custody rights (and faced with support obligations) even if their unrecognized unions broke up. It is possible to read this decision, cast into case law on the eve of the mini-DOMA, as an undercurrent of openness to same-sex parenting in Illinois’ courts, an impulse that was then repressed in decisions like *In re C.B.L.* and *In re Marriage of Simmons* during the mini-DOMA era.

If that interpretation is true, equality in parenting was an undercurrent that would resurface in time. The facts of *Connor v. Velinda C.*¹²³ show the willingness of an Illinois court to put a child’s best interests ahead of biology in making a custody determination. When an unwed teen gave birth to a daughter, the teen’s mother, Velinda, and the mother’s female partner, Barbara, jointly adopted the baby,¹²⁴ in the mode contemplated by the *Petition of K.M.* case above. Though Velinda and Barbara’s apparent intention was to raise the baby at home with its biological mother and, in time, reverse the adoption to return custody to the natural parent, a custody struggle ensued when Velinda and Barbara separated.¹²⁵ Relying on a case from the early 1990s, the court held that the custody-fitness factors in the marital Act applied to the women’s situation, even if they were not legally permitted to marry.¹²⁶ Given the vexed and volatile nature of life in

¹²⁰ See *Marriage of Simmons*, 825 N.E.2d at 313 (“In the instant case, equitable estoppel cannot apply because no action on the part of respondent can confer standing on petitioner to seek custody.”).

¹²¹ *In re Petition of K.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1995).

¹²² *Id.* at 890–91, 899.

¹²³ 826 N.E.2d 1265 (Ill. App. Ct. 2005).

¹²⁴ *Id.* at 1266–67.

¹²⁵ *Velinda C.*, 826 N.E.2d at 1266–67.

¹²⁶ *Id.* at 1271 (citing *Hall v. Hall*, 589 N.E.2d 553, 555 (Ill. App. Ct. 1991)). While they cohabited and adopted a child together, the nature of the women’s relationship is not clear. The baby’s natural grandmother/adoptive mother did invoke the Illinois mini-DOMA in attempting to persuade the court that the unfavorable marital law did not apply, ostensibly meaning to characterize her relationship with her partner as a would-be same-sex marriage. *Id.* Still, within two years of adopting the child, the

Velinda's home,¹²⁷ a trial court awarded, and the appeals court affirmed, custody over the daughter to Barbara.¹²⁸ The court relied on a marriage-dissolution statute to justify taking a child out of its biological mother's home, away from its biological grandmother's custody, and placing it in the permanent care of a same-sex partner who, under the mini-DOMA, could not have formed a marriage to dissolve.

Strikingly, the *Marriage of Simmons* and *Connor v. Velinda C.* cases both occurred in 2005 and both in the Illinois Appellate Court. Equally strikingly, where the *Marriage of Simmons* Court declined to find any basis on which the transgender parent could assert a custody claim over a child he helped create and rear, the *Velinda C.* Court, without fraught, allowed a biologically and matrimonially unrelated life partner to take custody. The dissonance in the decisions is most easily resolved by noting that the non-biological partner in *Velinda C.* was a legal adoptive parent.¹²⁹ As is hinted at in the Virginia case law, however, the different outcomes may also be the result of the court's reasoning that the best interests of the child trumped the state's condemnation of same-sex marriage.¹³⁰ It is possible that since the court in *Marriage of Simmons* was satisfied that the offspring was safe in its biological mother's care, it demurred to the mini-DOMA and refused to consider an equitable implication of parentage.¹³¹ Faced, however, with the prospect of a child growing up in a home beset by risk and instability, the *Velinda C.* Court chose to overlook any mini-DOMA complications and rest custody in the non-biological partner.¹³² In 2005, it

partner had married a man. *Id.* at 1269. The Court does not address the question of whether the women had, claimed to have had, or could have had a same-sex union of any kind.

¹²⁷ This volatility included financial difficulty, suicide attempts, self-harming behaviors, prescription-drug abuse, and the lingering effects of sexual abuse on members of the household. *Id.* at 1267.

¹²⁸ *Id.* at 1273.

¹²⁹ *Id.* at 1266.

¹³⁰ See *supra* Part IV (concluding by positing that the Virginia Court of Appeals may have put concern for children's welfare ahead of the state's position against same-sex marriage).

¹³¹ See *supra* notes 118–20 and accompanying text (noting that the court refused to countenance equitable estoppel for a plaintiff from a same-sex relationship).

¹³² This hypothesis can also explain the dissonant decisions in *Marriage of Simmons* and *Parentage of M.J.* The latter case dealt with an already married man who, for ten years, assumed a false identity and started a second family with the unsuspecting petitioner. *In re Parentage of M.J.*, 787 N.E.2d 144, 146 (Ill. 2003). Upon being exposed, he attempted to escape all liability for that second family. *Id.* Faced with a scoundrel who proposed to leave his children bereft, the Court quickly saw its way to the secondary solution of parentage by estoppel. *Id.* at 152. Facing no such compulsion in *Marriage of Simmons*, the Court perhaps felt liberated to enforce the mini-DOMA as strictly as possible. See *supra* notes 118–20 and accompanying text. The Court in *Marriage of Simmons* largely endorses this hypothesis, stating that estoppel of the *Parentage of M.J.* variety may be applied to petitions for child-support payments but not to establish parental custody or visitation rights. *In re Marriage of Simmons*, 825 N.E.2d 303, 312 (Ill. App. Ct. 2005). If the biological mother in *Marriage of Simmons* had been destitute and needed the transgendered father's assistance to keep the children off state support, or if the father had been attempting to evade child-support duties instead of establishing

is tempting to say that Illinois disallowed same-sex marriages but condoned same-sex-parentage when it protected the state's interest in child welfare.

By the end of 2013, Illinois' same-sex-parenting dynamic would be revolutionized both jurisprudentially and in public law. In 2012, with the case of *In re T.P.S.*,¹³³ the Illinois Appellate Court would again address the issues raised by *Marriage of Simmons*, with contrasting results. In a pattern familiar in this Note, two lesbian partners in a long-term relationship agreed to pursue a pregnancy by artificial insemination resulting in two children whom the couple raised coequally but without establishing legal adoption.¹³⁴ The partners broke up, the biological mother denied all contact with the girls to her former partner, and that partner filed an action to obtain parental rights.¹³⁵ In a decision that mirrors the *Marriage of Simmons* resolution, the trial court dismissed the partner's petition with prejudice, leaving the biological mother as the only legal parent of the girls.¹³⁶

The appeals court, however, reversed. Upending a crucial rule posited in *Marriage of Simmons*, the court held that "common law contract and promissory estoppel causes of action for custody and visitation" could be asserted by a petitioning "nonbiological parent."¹³⁷ This is precisely the rule that had been requested by the *Marriage of Simmons* father without success,¹³⁸ a rule that denudes the mini-DOMA of authority in child-custody situations. Without benefit of biology, adoption, or marriage, a purported parent in Illinois can nonetheless establish the right of custody or visitation over his or her child, just as the state can establish her or his duty of support, with parentage implied by estoppel. At the end of 2012, Illinois was still a mini-DOMA jurisdiction, but its courts had granted same-sex partners the same rights in relation to their children that the state's married citizens enjoyed.

In 2013, the Illinois legislature took the ultimate step and abandoned the mini-DOMA altogether.¹³⁹ By votes of thirty-two to twenty-one in the state Senate and sixty-one to fifty-four in the state House, Illinois became

visitation, would the court have been more solicitous toward him and raised the estoppel doctrines in that case?

¹³³ 978 N.E.2d 1070 (Ill. App. Ct. 2012).

¹³⁴ *Id.* at 1071–72.

¹³⁵ *Id.* at 1072.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1075.

¹³⁸ See *Marriage of Simmons*, 825 N.E.2d at 313 ("In the instant case, equitable estoppel cannot apply because no action on the part of respondent can confer standing on petitioner to seek custody.").

¹³⁹ Monique Garcia et al., *Lawmakers Affirm Gays' Right to Wed: Illinois Is Set to Join 14 Other States*, CHI. TRIB., Nov. 6, 2013, at C1.

the fifteenth state to usher in same-sex marriage.¹⁴⁰ In Illinois, at least, the evolving position of the judiciary on LGBT child-custody rights appears to have matched an evolution in public (and hence legislative) support, making the state a potential model for marriage-equality activists. The *Petition of K.M.* case pointed to a preexisting judicial openness to same-sex family rights that—though stymied for some seventeen years—was capable of revivification as the public’s mood and demographic make-up changed. The Illinois case study calls for locating the preexisting sympathies of lawmakers, enduring the setbacks of early cases, and over time making a subtle but persuasive showing of the need for and benefits accruing to society from same-sex parents in state-sanctioned marriages.

That case study, however, should be embraced with caution: Illinois may not be a model for the nation. As Illinois’ mini-DOMA was never enshrined in its state constitution, repeal was procedurally much less complicated than it will or would be in the majority of states banning same-sex marriage. Further, despite Illinois’ potential conservative leanings, the state sits neither in the Mountain West nor the Deep South. The undercurrent of sympathy supporting same-sex parenting in Illinois may never have been manifest at all in more conservative states, making the challenge one of creation rather than resuscitation. This Note now moves west and south to examine such creation’s chances.

B. Case Law Developments in Montana

If Illinois is tightly woven into the center of American society, Montana is, according to one historian, defined by “isolation, rugged land, severe weather, and small population.”¹⁴¹ Even the state’s name, derived from a Latinate adjective meaning “mountainous,”¹⁴² seems to tout harshness, remoteness, and solitude. Given its geographic aloofness and historically extraction-based economy,¹⁴³ one might assume Montana would be among the reddest of states, and, indeed, all but twice since 1952 Montana has given its Electoral College votes to the Republican ticket.¹⁴⁴ Yet a palpable legacy of frontier independence may be detected in its politics: while its state legislature boasts strong G.O.P. majorities in both

¹⁴⁰ Dave McKinney, *Gay Marriage Bill Passes State House, Senate—Heads to Quinn’s Desk*, CHI. SUN-TIMES (Nov. 5, 2013), <http://www.suntimes.com/23558841-418/gay-marriage-bill-passes-in-illinois-house.html>.

¹⁴¹ Mary Melcher, “Women’s Matters”: *Birth Control, Prenatal Care, and Childbirth in Rural Montana, 1910–1940*, in MONTANA LEGACY: ESSAYS ON HISTORY, PEOPLE, AND PLACE 132, 148 (Harry W. Fritz et al. eds., 2002).

¹⁴² MICHAEL P. MALONE ET AL., MONTANA: A HISTORY OF TWO CENTURIES 95 (rev. ed. 1991).

¹⁴³ Pat Williams, *Foreword* to GREG LEMON, BLUE MAN IN A RED STATE: MONTANA’S GOVERNOR BRIAN SCHWEITZER AND THE NEW WESTERN POPULISM, at vii (2008).

¹⁴⁴ *Montana Election Results*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/state.php?year=0&off=99&elect=0&fips=30&f=0> (last visited Apr. 15, 2014).

chambers,¹⁴⁵ its two U.S. senators are Democrats,¹⁴⁶ as is its governor.¹⁴⁷ John Patrick Williams, an eighteen-year Montana Congressman, described the region's politics toward the end of the twentieth century by saying, "For one hundred years the West's political pendulum had swung consistently between Democrats and Republicans."¹⁴⁸

There is evidence of such independent thinking in Montanans' history of shirking tradition and custom to forge their own solutions to social and family challenges. It was "common among rural and working-class women in Montana well into the twentieth century" to give birth at home assisted only by "neighbors, midwives, and husbands."¹⁴⁹ With the dearth of "ministers, priests, and rabbis" in Montana for much of its history, the territorial government authorized a range of public officials to conduct wedding ceremonies, and the law liberally sanctioned common-law marriages so long as they had been recognized by the public.¹⁵⁰

Even so, liberality has its boundaries. The "West" depicted by Congressman Williams is the American "Mountain West," an eight-state region¹⁵¹ where seven states (including Montana) have mini-DOMAs, five (including Montana) have both statutory and constitutional mini-DOMAs, and only one has legalized same-sex marriage.¹⁵² Despite its legacy of tolerating self-help solutions where marriage and children are concerned,¹⁵³ Montana has also manifested an abiding desire to bring matrimony into conformity with societal mores. Both in the late nineteenth century and again in the Great Depression, campaigns sprang up to ban common-law marriage in Montana.¹⁵⁴ While these campaigns failed to change the law, Martha Kohl notes their cultural success: "regardless of the legality of

¹⁴⁵ 63rd Legislature Demographics, 2013–2014, MONT. LEGISLATURE, <http://leg.mt.gov/css/About-the-Legislature/Facts-and-Statistics/2013-demographics.asp> (last visited Apr. 15, 2014).

¹⁴⁶ Congressional Delegation, MONTANA.GOV, http://mt.gov/govt/congressional_delegation.mcp (last visited Apr. 15, 2014).

¹⁴⁷ Matt Volz, *Bullock Defeats Hill in Montana Governor Race*, BISMARCK TRIB., Nov. 8, 2012, at B1.

¹⁴⁸ Williams, *supra* note 143, at viii; *Pat Williams: Senior Advisor*, WILLIAMSWORKS, <http://williamsworks.com/team/pat-williams/> (last visited Apr. 15, 2014).

¹⁴⁹ Melcher, *supra* note 141, at 134.

¹⁵⁰ MARTHA KOHL, *I DO: A CULTURAL HISTORY OF MONTANA WEDDINGS* 12 (2011).

¹⁵¹ See U.S. CENSUS BUREAU, CENSUS BUREAU REGIONS AND DIVISIONS WITH STATE FIPS CODES (2010), available at http://www.census.gov/geo/maps-data/maps/pdfs/reference/us_regdiv.pdf (identifying Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming as the Mountain West region).

¹⁵² Arizona, Colorado, Idaho, Montana, and Utah ban gay marriage both by statute and constitutional amendment. *Gay Marriage*, *supra* note 9. Nevada only has a constitutional ban while Wyoming only maintains a statutory ban. *Id.* Colorado and Nevada do allow non-marital same-sex domestic unions. Ahuja & Chow, *supra* note 12. New Mexico sanctioned same-sex marriage at the end of 2013. Carcamo, *supra* note 11.

¹⁵³ See *supra* notes 149–50 and accompanying text.

¹⁵⁴ KOHL, *supra* note 150, at 7.

common-law marriages, couples wanted official sanction.”¹⁵⁵ The Montana legislature has instituted various waiting periods prior to marriage licensure in a fruitless effort to reduce cohabitation and divorce,¹⁵⁶ and Montana’s highest court defended the institution by naming married—or even merely engaged—persons a “protected class” for civil-rights purposes.¹⁵⁷ Most relevant to this Note, Montana has prohibited same-sex marriage statutorily¹⁵⁸ and in 2004 via constitutional amendment.¹⁵⁹

Still, it is the thesis of this Note that even where the most fundamental laws clearly disallow same-sex marriage, same-sex partners can sometimes establish equal civil rights to their heterosexual counterparts. For example, in *Snetsinger v. Montana University System*,¹⁶⁰ two lesbian couples, each with a partner employed by the defendant, challenged the Montana University System’s policy of subsidizing spousal benefits to marital and heterosexual common-law spouses of employees, but not to same-sex partners.¹⁶¹ The court held that a “policy of denying health benefits to unmarried same-sex couples while granting the benefits to unmarried opposite-sex couples results in a denial of equal protection.”¹⁶² While the court stressed “what this case is not about”—Montana’s marriage laws—and insisted that granting a same-sex couple equal standing to a legally recognized common-law couple did not equate to a right to common-law marriage for same-sex partners, it is hard to see how the holding does not create a quasi-marital status.¹⁶³ In a state statutorily set against gay marriage and in a year when its voters would cast that opposition into constitutional authority, same-sex partners won in court a significant social benefit previously thought reserved to heterosexual couples.

Similar victories have occurred for LGBT legal activists where Montanan child-custody issues are concerned, in decisions perhaps more plausible from a Massachusetts or California court than one in a mini-DOMA jurisdiction. In the case of *In re L.F.A.*,¹⁶⁴ a biological mother

¹⁵⁵ *Id.* at 12.

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Vortex Fishing Sys., Inc. v. Foss*, 38 P.3d 836, 839–40 (Mont. 2001).

¹⁵⁸ See MONT. CODE ANN. § 40-1-401(d) (prohibiting “a marriage between persons of the same sex”).

¹⁵⁹ See Timothy Egan, *Montana Democrats Reflect on Success*, N.Y. TIMES, Nov. 14, 2004, at 1–28 (listing the gay-marriage referendum as an exception to Democrats’ remarkable success in 2004 state races); MONT. CONST. art. XIII, § 7 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”).

¹⁶⁰ 104 P.3d 445 (Mont. 2004).

¹⁶¹ *Id.* at 448.

¹⁶² *Id.* at 452.

¹⁶³ *Id.* at 449. The court’s denials that it had consecrated common-law gay marriage were so unconvincing to one dissenting justice that he claimed they reached “the dewpoint of duplicity.” *Id.* at 475 (Rice, J., dissenting).

¹⁶⁴ 220 P.3d. 391 (Mont. 2009).

argued that only biology or adoption could establish parentage under Montana law, meaning her erstwhile same-sex partner had no claim to visitation with the three children they had raised together.¹⁶⁵ The Montana Supreme Court, however, endorsed a trial court finding that the non-biological mother had sufficiently acted as a parent to the children to obtain in loco parentis status,¹⁶⁶ largely echoing the estoppel-parentage doctrines discussed in Part III of this Note. On finding that keeping the non-biological, non-adoptive parent as a part of the children's lives was in their best interest, the court approved a parenting arrangement that alternated custody between the two mothers.¹⁶⁷ This split-custody arrangement shows that courts may not read the mini-DOMA as an overriding social condemnation of same-sex relationships in the way that Virginia's ternary mini-DOMA apparently intended.¹⁶⁸ Rather, just as the court treated same-sex couples and opposite-sex couples equally in *Snetsinger*,¹⁶⁹ the court here treated a non-biological homosexual parent the same as a biological or heterosexual one, allowing her an equal chance to prove her implied parentage.

Lest this case be read as an anomaly, the contemporaneous controversy in *Kulstad v. Maniaci*¹⁷⁰ confirms, and perhaps extends, the court's approach. *Kulstad* is the case of two women who cohabited, exchanged rings, and represented themselves as partners, despite the absence of a same-sex legal institution under state law.¹⁷¹ Over time, the partners adopted two children, portraying themselves as co-parents during a "home study" with social workers prior to each adoption.¹⁷² Although only one of the women became the legal adoptive mother, both women played full and active roles in raising the children, functioning, in the court's words, "much like any other two-parent family."¹⁷³ Upon the dissolution of their union, the adoptive mother fought—as the biological mother had in *In re L.F.A.*—to have her former partner denied custody of the adopted children.¹⁷⁴

The court took note of the trial court's conclusion that while the adoptive mother was indeed the sole legal parent theretofore, the non-adoptive mother had played a full parental role, the continuation of which

¹⁶⁵ *Id.* at 392–93.

¹⁶⁶ *Id.* at 395.

¹⁶⁷ *Id.* at 394–95.

¹⁶⁸ See *supra* notes 68–70 and accompanying text (explaining that Virginia enacted two statutes and a constitutional ban to insulate itself from the effects of same-sex marriage).

¹⁶⁹ See *supra* notes 160–63 and accompanying text (reviewing Montana high court's holding that same-sex couples had same rights to benefits as heterosexual couples).

¹⁷⁰ 220 P.3d 595 (Mont. 2009).

¹⁷¹ *Id.* at 597.

¹⁷² *Id.* at 597–98.

¹⁷³ *Id.* at 598.

¹⁷⁴ *Kulstad*, 220 P.3d at 599.

was in the children's best interest.¹⁷⁵ The court's affirmation of a trial-court order of joint custody ratified the *In re L.F.A.* holding and clarified that it extends to the realm of adopted children.¹⁷⁶ Whether over the biological or adoptive children of their same-sex partners, when putative LGBT parents establish implied parentage they can, in Montana, assert custody claims with the same force as heterosexual parents.¹⁷⁷ The ultimate resolution of the case makes the doctrine only clearer: when the adoptive mother left Montana for an extended period and failed to participate in the parenting plan, the trial court modified its order to grant sole custody to the non-adoptive mother.¹⁷⁸ Upon the adoptive mother's return, the case again reached the Montana Supreme Court, again resulting in an affirmation.¹⁷⁹ A lesbian partner who, under the mini-DOMA, had no apparent parental rights nonetheless left a Montana court as the sole custodial parent.

In the *Snetsinger* case, the Montana courts gave same-sex partners the same access to their partners' health benefits that opposite-sex partners enjoyed.¹⁸⁰ In *In re L.F.A.* and the two holdings of the *Kulstad* case, those courts gave same-sex partners the same consideration over their partners' children that opposite-sex implied parents would enjoy.¹⁸¹ As they allow same-sex partners certain rights and benefits of marriage, these decisions may seem not at all in keeping with the two mini-DOMA provisions governing Montana family law.¹⁸² Yet as this Section has revealed, Montana has a history of publicly encouraging traditional, formal marriage while placidly tolerating the common-law cohabitation of consenting adults.¹⁸³ Allowing couples, like those in *Snetsinger*, to obtain the spousal benefits they need to order their lives is out of sync with Montana's mini-DOMA prohibitions, but it is not out of line with Montana's history of allowing isolated populations to determine their own modes of marriage and family life. Granting parental rights to same-sex couples also seems to fit naturally into this narrative of independent life-ordering. Whether Montanans' endorsement of family independence will one day include a right to full same-sex marriages remains unknown but now seems entirely feasible.

¹⁷⁵ *Id.* at 609.

¹⁷⁶ *Id.* at 609–10.

¹⁷⁷ Further, the non-adoptive mother was also awarded more than \$100,000 from her former partner on equitable grounds, enhancing the degree to which the Court treated her as a common-law spouse. *Id.* at 610.

¹⁷⁸ *Kulstad v. Maniaci*, 244 P.3d 722, 725–26 (Mont. 2010).

¹⁷⁹ *Id.* at 732.

¹⁸⁰ See *supra* note 162 and accompanying text.

¹⁸¹ See *supra* notes 167–68, 176, 178 and accompanying text.

¹⁸² See *supra* notes 158–59 and accompanying text.

¹⁸³ See *supra* notes 150, 156, 157 and accompanying text.

C. Case Law Developments in Alabama

Their same-sex marriage legislation notwithstanding, Illinois and Montana have never provided the most severe challenges for marriage-equality seekers. Few jurisdictions have been as hostile to same-sex marriage as Alabama, a state that has produced only one openly gay lawmaker in its one-hundred-ninety-four-year history.¹⁸⁴ Alabama is one of twenty-six states to have banned same-sex marriage both by legislation¹⁸⁵ and constitutional amendment.¹⁸⁶ The Alabama Marriage Protection Act¹⁸⁷ passed the state's house chamber by a seventy-nine to twelve vote and the state senate by thirty to zero.¹⁸⁸ A referendum adding a gay-marriage ban to the state constitution was voted in by the public—with eighty-one percent support—in June 2006.¹⁸⁹

Both the statute and the amendment function as mini-DOMAs. The former states that Alabama “shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued,”¹⁹⁰ insulating Alabama's government and courts from the actions of marriage-equality states like Massachusetts and New York. Identical language appears in the constitutional amendment, further precluding full-faith-and-credit treatment.¹⁹¹

Alabama's governors, lawmakers, and populace seem to have agreed that same-sex marriage and its attendant rights shall have no viability in their state, and this agreement is as strong and clear in Alabama as in any other state in the union.¹⁹² Such deep and abiding policy statements could be expected to translate into a judicial stance against parents in same-sex unions, and indeed an exploration of Alabama's child-custody case law accordingly reads as a series of setbacks and disappointments for marriage equality. Yet, even as far south as Montgomery, there are emerging signs

¹⁸⁴ See Jake Grovum, *Woman Trying to Change Alabama Gay Marriage Ban*, CHARLESTON GAZETTE, July 6, 2013, at PIC (reporting on openly gay state legislator Patricia Todd's plans to marry her partner in Massachusetts and challenge the Alabama ban in state court).

¹⁸⁵ ALA. CODE § 30-1-19 (LexisNexis 2011).

¹⁸⁶ ALA. CONST. amend. 774.

¹⁸⁷ Act 1998-500 (codified at ALA. CODE § 30-1-19 (LexisNexis 2011)).

¹⁸⁸ *Same-Sex Marriages Banned in Alabama*, TUSCALOOSA NEWS, Apr. 28, 1998, at 7A.

¹⁸⁹ *Alabama Voters Send Mixed Message on Religion*, CHI. SUN-TIMES, June 8, 2006, at 32.

¹⁹⁰ ALA. CODE § 30-1-19(e).

¹⁹¹ See ALA. CONST. amend. 774(e) (stating Alabama “shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred”).

¹⁹² According to a 2013 report, Alabama ranks among the bottom three states in terms of public support for gay marriage—alongside Arkansas and Louisiana. ANDREW R. FLORES & SCOTT BARCLAY, UCLA WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE 4 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Flores-Barclay-Public-Support-Marriage-By-State-Apr-2013.pdf>. All three states ban same-sex marriage by both statute and constitutional amendment. *Gay Marriage*, *supra* note 9.

of a doctrinal and practical evolution in Alabama's position on same-sex parental rights.¹⁹³

In the recent past, Alabama's courts have been notably hostile to same-sex partners' purported parenting rights. Almost contemporaneously with the advent of Alabama's mini-DOMA, the Alabama Supreme Court held in *Ex parte J.M.F.*¹⁹⁴ that a custodial parent's openly gay lifestyle was potentially detrimental to a child's development and provided a legitimate basis for a court to upend a custody order.¹⁹⁵ In the underlying case, *J.B.F. v. J.M.F.*,¹⁹⁶ a mother who had been awarded custody of her daughter upon the dissolution of a marriage soon began cohabiting with a lesbian partner.¹⁹⁷ The mother and her partner formed a committed relationship and exchanged rings, and the partner actively participated in the child's life by attending school functions and field trips.¹⁹⁸ At the end of 1994, however, the girl's father filed a motion to modify custody on the grounds that his ex-wife was "openly and notoriously" carrying on a lesbian relationship.¹⁹⁹

The trial court received a report from its appointed psychologist stating that the daughter was "developing normally," that she "desired to live with the mother," and that "fears about children . . . isolated in single-sex lesbian or gay communities are unfounded."²⁰⁰ It adduced testimony from the child that she loved her mother, her mother's partner, her father, and her stepmother all in kind.²⁰¹ Yet the trial court granted the modification, transferring the girl to her father's custody and issuing a visitation restriction that prevented the mother's partner from being present during visits.²⁰² Reviewing the case in 1997, the Alabama Court of Civil Appeals characterized the child as a "bright, happy, well-adjusted seven-year-old girl" who "enjoys living with her mother and her mother's companion."²⁰³ The court noted that the father considered his ex-wife "a good mother" who had "done a good job of raising the child."²⁰⁴ The court held that the father bore the burden of demonstrating that the mother's relationship affected the child detrimentally; absent that, the mere fact of an open homosexual relationship was not in itself grounds for a custody

¹⁹³ See *infra* notes 237–53 and accompanying text.

¹⁹⁴ 730 So. 2d 1190 (Ala. 1998).

¹⁹⁵ *Id.* at 1195–96.

¹⁹⁶ 730 So. 2d 1186 (Ala. Civ. App. 1997), *rev'd sub nom. Ex parte J.M.F.*, 730 So. 2d 1190.

¹⁹⁷ *Id.* at 1187.

¹⁹⁸ *Id.* at 1188.

¹⁹⁹ *Id.* at 1187.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1188.

²⁰² *Ex parte J.M.F.*, 730 So. 2d 1190, 1194 (Ala. 1998).

²⁰³ *J.B.F. v. J.M.F.*, 730 So. 2d at 1188.

²⁰⁴ *Id.*

modification.²⁰⁵ It reversed the trial court's order, leaving the girl in the same-sex household.²⁰⁶

In June 1998, roughly six weeks after Alabama's statutory mini-DOMA became law, the state supreme court overruled the appellate decision, reinstating the trial court's modification and holding:

[T]he inestimable developmental benefit of . . . a successful marriage is undisputed. The [remarried] father's circumstances have changed, and he is now able to provide this benefit The mother's circumstances have also changed, in that she is unable, while choosing to conduct an open cohabitation with her lesbian life partner, to provide this benefit.²⁰⁷

The dissonance between the appellate and highest courts here is telling.²⁰⁸ The appellate court had held that a custody modification "solely because of a lesbian relationship" was "plainly and palpably wrong," apparently concluding that same-sex couples were equally fit to raise children and requiring a showing of harm to mount a custody challenge.²⁰⁹ This holding was not out of line with the state's mini-DOMA, which did not, on its face, address child-custody issues or make it illegal for homosexual citizens to produce and rear children.²¹⁰ Still, ruling in the era following that law, the state supreme court reversed to say that heterosexual couples are—as the only couples capable of marrying—de facto better parents than those of in same-sex relationships.²¹¹ As few same-sex appellants could point to a clearer example of a "happy, well-adjusted" child than that of the *J.M.F.* mother,²¹² the case suggests that, all else being equal, any traditionally remarried parent will be able to secure primary custody of his or her children against a same-sex-cohabiting ex, even to the point of excluding the ex's new partner from visitation. At the conclusion of the *J.M.F.* cases, Alabama's mini-DOMA regime and its

²⁰⁵ *Id.* at 1189.

²⁰⁶ *Id.* at 1190.

²⁰⁷ *Ex parte J.M.F.*, 730 So. 2d at 1196.

²⁰⁸ It is compelling to ponder whether the Court of Civil Appeals would have reached the same result had it decided the case after the advent of the mini-DOMA statute.

²⁰⁹ *J.B.F. v. J.M.F.*, 730 So. 2d at 1190.

²¹⁰ See ALA. CONST. amend. DCCLXXIV (disallowing same-sex marriage but not mentioning children or parentage). It is possible that an explicit condemnation was not considered necessary, as sodomy between any persons outside of marriage was itself a crime in Alabama until that prohibition was struck down by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The plaintiff-mother in *J.B.F. v. J.M.F.* had, for example, been careful to tell the courts that she and her partner kissed, hugged, and held hands but nothing more, 730 So. 2d at 1188, a dodge the Civil Court of Appeals seemed at once to see through and endorse.

²¹¹ See *supra* note 207 and accompanying text.

²¹² See *supra* note 203 and accompanying text.

child-custody case law appeared to be marching in lockstep.

The *J.M.F.* case did not address whether adoption might allow same-sex partners to establish court-recognized parentage. However, a much more recent Court of Civil Appeals case focusing on adoption turned on the Alabama mini-DOMA as a bulwark against full faith and credit. *In re Adoption of K.R.S.*²¹³ followed the 2008 same-sex marriage, in California, of an Alabama mother and a woman called C.D.S. who sought to adopt the mother's child, K.R.S.,²¹⁴ pursuant to Alabama's step-parent adoption law.²¹⁵ The court, after a straightforward recitation of the state's statutory and constitutional mini-DOMA components,²¹⁶ concluded that C.D.S. and the child's mother were not married in Alabama, that C.D.S. was therefore not a step-parent, and that the legislature and voting public had already disposed of C.D.S.'s policy arguments in creating the mini-DOMA.²¹⁷ The court held that C.D.S. had no right to adopt the child, ensuring the state remained entitled to deny same-sex partners parenting rights based on extra-territorial marital proceedings under the existing mini-DOMA.²¹⁸

In ruling against C.D.S., the court did offer the small hope that her challenge was not formulated to reach constitutional issues, possibly implying such a challenge could be mounted.²¹⁹ But even so, the case makes a robust statement that gay-marriage developments in other states shall have no power to affect parenting rights in Alabama. The fact that the case occurred fifteen years after *J.B.F. v. J.M.F.*, and that the Court of Civil Appeals decided it after being supportive of same-sex-parenting capacity in that earlier case,²²⁰ may make the mini-DOMA-backed pronouncements of this court all the sharper.

Alabama's mini-DOMA is intended to prevent the advent of legal gay marriage in states like California from foisting gay-marriage rights upon citizens appearing in Alabama's courts.²²¹ The case of *A.K. v. N.B.*,²²² which tested the doctrinal intimations laid out by the Alabama courts in *J.B.F.* and *K.R.S.*, followed (both in time and doctrine) on the heels of a well-known California child-custody case, *Elisa B. v. Superior Court*.²²³ In

²¹³ 109 So. 3d 176 (Ala. Civ. App. 2012).

²¹⁴ *Id.* at 177.

²¹⁵ ALA. CODE § 26-10A-27 (LexisNexis 2011) (stating that "[a]ny person may adopt his or her spouse's child" providing three exceptions do not apply, none of which touches on same-sex relationships).

²¹⁶ *In re K.R.S.*, 109 So. 3d at 177.

²¹⁷ *Id.* at 178. The court did not enumerate those policy positions.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *supra* notes 205–06 and accompanying text.

²²¹ See ALA. CODE § 30-1-19(e) (LexisNexis 2011) (barring recognition in Alabama of "any marriage of parties of the same sex that occurred . . . as a result of the law of any jurisdiction").

²²² 66 So. 3d 242 (Ala. Civ. App. 2008), *vacated*, *Ex parte N.B.*, 66 So. 3d 249 (Ala. 2010).

²²³ 117 P.3d 660 (Cal. 2005).

Elisa B., the California Supreme Court declared that it could “perceive no reason why both parents of a child cannot be women.”²²⁴ The women were Elisa and Emily, who lived together as a committed couple between 1993 and 1999. They decided as partners each to get pregnant with the same donor sperm and then supported each other throughout concurrent pregnancies. After both had given birth (Emily to twins), they chose their offspring’s names together, gave them a hyphenated family name, and mutually breastfed them without regard to the biological relationships.²²⁵

When the couple broke up, Elisa—who had been the designated breadwinner—eventually ceased supporting Emily and Emily’s two biological children, claiming she had no paternal relationship to them.²²⁶ Recognizing that Elisa had participated in producing the children and had made promises to care for them, a trial court ordered Elisa to pay child support on an equitable-estoppel theory.²²⁷ The Court of Appeal held Elisa was not a parent of Emily’s twins and reversed the order.²²⁸ The California Supreme Court, relying on California’s Uniform Parentage Act²²⁹ but applying it without regard to gender, held that as Elisa had “received the twins into her home and openly held them out as her natural children” she met the definition of a *de facto* parent under California law and had an ongoing responsibility to support Emily’s offspring.²³⁰

A.K. v. N.B., the aforementioned Alabama case, differed from *Elisa B.* in that its plaintiff sought to establish, rather than escape, her responsibility for and rights over a child. Still, in other respects it was nearly identical. A.K. and N.B. were a committed lesbian couple in California.²³¹ In 1998, N.B. donated an egg for artificial insemination and carried the child to term;²³² although only N.B.’s name appeared on the child’s birth certificate, A.K.’s family name was recorded in the hyphenated last name given to the baby.²³³ N.B. and A.K. separated in 2004, and by August 2005, N.B. had followed her parents to Alabama, where she established a new home and eventually married a man.²³⁴ In September 2005, A.K. filed a petition for parental recognition with the California courts to establish

²²⁴ *Id.* at 666.

²²⁵ *Id.* at 663.

²²⁶ *Id.* at 663–64; *Elisa Maria B. v. Superior Court*, 13 Cal. Rptr. 3d 494, 497 (Ct. App. 2004), *rev’d sub nom Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

²²⁷ *Elisa B.*, 117 P.3d at 663–69.

²²⁸ *Id.*; *Elisa Maria B.*, 13 Cal. Rptr. 3d at 507.

²²⁹ CAL. FAM. CODE §§ 7600–7670 (West 1994).

²³⁰ *Elisa B.*, 117 P.3d at 672–73 (Kennard, J., concurring) (citing CAL. FAM. CODE § 7611(d)).

²³¹ *A.K. v. N.B.*, 66 So. 3d 242, 243 (Ala. Civ. App. 2008), *vacated, Ex parte N.B.*, 66 So. 3d 249 (Ala. 2010).

²³² *See id.* (neglecting to explain the couple’s decision-making but apparently characterizing them as “co-parents”).

²³³ *Ex parte N.B.*, 66 So. 3d at 250.

²³⁴ *Id.* at 250–51.

her right to visitation with the child, which eventually led to California awarding her visitation and ordering that her name be added to the child's birth certificate as a second parent in the model of *Elisa B.*²³⁵ Yet an Alabama trial court later refused to enforce the California order, leaving A.K. essentially without any parental rights in Alabama.²³⁶

To this point, *A.K. v. N.B.* appears to embody the rationale of *In re Adoption of K.R.S.*: Alabama strictly enforces its mini-DOMA to deny same-sex-marital rights granted by other states. The Alabama Court of Civil Appeals, however, reversed the lower court.²³⁷ The appellate court held that the federal Parental Kidnapping Prevention Act²³⁸ ("PKPA") required Alabama to yield to California's jurisdiction in the case because at the time the California court took up the issue of A.K.'s parental status, N.B. had not yet established residency in Alabama.²³⁹ Over N.B.'s plainly stated request for a rejection of full faith and credit for child-custody orders, the court opined:

[T]he PKPA does not merely apply to situations in which the court of a child's home state has entered an order or judgment adjudicating a party's visitation rights; rather, it bars courts in other states from exercising jurisdiction to make a custody or visitation determination during the pendency of proceedings in the child's home state.²⁴⁰

Here the PKPA, a 1980 federal law that predates DOMA and was conceived and executed without any reference to the vagaries of same-sex marriage, operates to enshrine same-sex partners' rights over their biological or, as in *A.K. v. N.B.*, non-biological/non-adoptive children. While the PKPA did not and could not direct Alabama's courts to grant custody rights to A.K. under Alabama law, it nonetheless allowed A.K. to enforce such rights secured in California in Alabama's courts—the crosspollination of civil rights contemplated by this Note. The PKPA does nothing overt to foist gay marriage upon mini-DOMA states, but it does work to isolate a bundle of rights derived from state recognition of same-sex relationships and ensure that those rights endure even after the parties have relocated to mini-DOMA states that would not have devised the rights in the first place.

There is a coda to *A.K. v. N.B.* that gives pause to any bold declaration about the case: in *Ex parte N.B.*, the Alabama Supreme Court rendered the

²³⁵ *A.K. v. N.B.*, 66 So. 3d at 244–45.

²³⁶ *Id.* at 246.

²³⁷ *Id.* at 248.

²³⁸ See 28 U.S.C. § 1738A (2012) (mandating that "[f]ull faith and credit given to child custody determinations"); *supra* Part IV.

²³⁹ *A.K. v. N.B.*, 66 So. 3d at 246.

²⁴⁰ *Id.* at 247.

case moot by vacating the original juvenile-court case and Court of Civil Appeals reversal and quashing its own grant of certiorari.²⁴¹ The supreme court stated that as the Alabama cases had begun with an improper ex parte motion by N.B., both of the lower courts' orders had to be vacated.²⁴² Hence, no state supreme court decision on the merits was ever taken, and, as no further action has been filed, a final disposition of the state-level doctrine remains unknown. The appellate court's clear endorsement of full faith and credit for out-of-state child-custody orders, however, coupled with the supreme court's disposal of the case on strictly procedural grounds, may mean marriage-equality supporters have reason to be optimistic that the parenting rights of same-sex partners, once established in marriage-equality jurisdictions, will survive within the borders of Alabama.

There is very recent evidence that such optimism is not misplaced. It is true that the Alabama Supreme Court sent the clear message that since a remarried heterosexual father could "provide [the] benefit" of a "successful marriage," while a now-single mother could not if "cohabit[ing] with her lesbian life partner," the father's demands for a custody modification would be granted.²⁴³ Yet at the end of July 2013, the Circuit Court of Mobile County entered an order that appears to evade that high court's strictures. *Walsh v. Hughes*,²⁴⁴ echoing *J.M.F.*, concerned a divorce in the state of Washington after which the newly single mother, Hughes, entered into a committed domestic partnership under that state's laws with her same-sex lover.²⁴⁵ According to an account published by Hughes herself, after the ex-husband, Walsh, moved to Alabama with their four children, Hughes moved from Washington to Alabama with the intention of continuing to see the kids (in line with the terms of the couple's Washington visitation order).²⁴⁶

Once in Alabama, Walsh refused to allow the visits, leading to an incident in which Hughes attempted to see the children at their school on her appointed visitation day.²⁴⁷ School officials and local police refused to countenance her Washington state visitation order,²⁴⁸ an echo in form, if not in judicial substance, of the dispute in *J.M.F.* Walsh then filed a

²⁴¹ *Ex parte N.B.*, 66 So. 3d 249, 256 (Ala. 2010).

²⁴² *Id.*

²⁴³ *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998).

²⁴⁴ Order on Agreement, *Walsh v. Hughes*, No. DR-2011-500192.04 (Ala. Cir. Ct. Mobile Cnty. July 30, 2013).

²⁴⁵ Brendan Kirby, *Possible Alabama First: Judge Allows Children Overnight Visits to Mobile Lesbian Mom and Partner*, AL.COM (Aug. 1, 2013, 1:14 PM), http://blog.al.com/live/2013/08/possible_alabama_first_judge_a.html.

²⁴⁶ Chelsea Hughes, *States Must Respect the Rights of LGBT Parents*, S. POVERTY L. CTR. (Aug. 26, 2013), <http://www.splcenter.org/get-informed/news/states-must-respect-the-rights-of-lgbt-parents>.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

motion with the local court to modify visitation and prevent Hughes from having unfettered contact with the children.²⁴⁹ Walsh's attorney pointed to Hughes and her lovers' bathing together in front of the children, displaying affection in front of them, and taking them to a gay-pride parade in requesting that future visitation be supervised and with restrictions on Hughes' partner.²⁵⁰

Walsh v. Hughes ended in an agreed settlement, but the contents of that agreement represent a stark departure from the doctrinal implications of *J.M.F.* The Mobile Circuit Court approved a very favorable visitation order for Hughes, restoring her right to overnight custody of her children on alternate weekends and for large blocks of the summer.²⁵¹ No restriction was placed on Hughes' partner nor on Hughes' interaction with her partner in the children's presence; in fact, the court's order makes no mention of the partner or Hughes' sexual orientation.²⁵² The Southern Poverty Law Center (SPLC), which had represented Hughes, trumpeted the result, declaring it was "believed to be a first in Alabama"²⁵³: an Alabama court had positively approved a same-sex partner's child-custody rights and had done so in an order apparently not to be reviewed or struck down by a higher court.

Whether the case is a first is dubious; the SPLC admits that stingy publishing makes it difficult to survey all Alabama custody orders,²⁵⁴ and even then, a negotiated settlement is not a high court verdict with precedential power. The result does, however, suggest that the doctrine laid out in *J.M.F.* is not having an absolutely deleterious effect on the parental rights of gay citizens. Both Hughes' local attorney and the SPLC insist they were eager to take the case to court,²⁵⁵ suggesting, if true, that they may see in the appellate court's holdings in *J.M.F.* and in *A.K. v. N.B.*²⁵⁶ the possibility of evolution in Alabama's strict stance against out-of-

²⁴⁹ Kirby, *supra* note 245.

²⁵⁰ *Id.*

²⁵¹ Order on Agreement at 1, *Walsh v. Hughes*, No. DR-2011-500192.04 (Ala. Cir. Ct. Mobile Cnty. July 30, 2013).

²⁵² *Id.*

²⁵³ *Alabama Judge Validates Lesbian Mom's Visitation Rights to Her Children*, S. POVERTY L. CTR. (Aug. 1, 2013), <http://www.splcenter.org/get-informed/news/alabama-judge-validates-lesbian-mom-s-visitation-rights-to-her-children>.

²⁵⁴ *See id.* ("Although similar rulings may have occurred in Alabama where such orders are not widely published, this appears to be the first time an Alabama trial court has approved standard visitation rights for an avowedly lesbian or gay parent.").

²⁵⁵ *See* Kirby, *supra* note 245 ("[Mobile lawyer Richard Shields] and Hughes' other lawyers insisted they would go to trial rather than accept [a clause restricting the presence of a same sex partner during overnight visitation] as part of any settlement."); *Alabama Judge Validates Lesbian Mom's Visitation Rights to Her Children*, *supra* note 253 ("The order validates a successful resolution on behalf of Chelsea and the children in the case in which SPLC lawyers were prepared for trial absent successful agreement.").

²⁵⁶ *See supra* notes 205–06, 237–39.

state same-sex marital rights leading to in-state child-custody rights. It is noteworthy that the final Order of Agreement in *Walsh* mandates that Hughes shall pay Walsh \$465 per month in child support while Walsh will continue to insure the children through Medicaid.²⁵⁷ The plaintiff, and perhaps the court, possibly valued non-custodial parent Hughes more as a source of financial support than they felt affronted by her sexual orientation and lifestyle. The resolution of *Walsh v. Hughes* may remain an anomaly in Alabama's child-custody case law, but it may also be a harbinger.

VI. CONCLUSION

There have no doubt been myriad moments when marriage-equality supporters imagined a *Brown v. Board of Education*²⁵⁸-type victory that would, in one sweep, enshrine same-sex unions into America's national law and culture. Activists have every right and reason to pursue such a strategy. Yet both law and culture are already being changed by the subtle power of family-court decisions based on existing, non-revolutionary common and statutory law. Such progress is often discounted as incrementalism, but in the struggle for LGBT family law rights, there may be great persuasive power in showing that what is being asked for is not an exotic departure from social norms but simply a just application of existing social mores. It may be precisely such subtle persuasion, built up case by case through state courts, that birthed Illinois' adoption of gay marriage in 2013. As each new state adopts same-sex marriage, new cases derived from that state's marriages may find their way to the mini-DOMA courts of their neighboring jurisdictions, crosspollinating marriage equality through parental rights and obligations.

In the Virginia of 2014, the eight-year-old ban on same-sex marriage has been struck down by a federal judge as unconstitutional,²⁵⁹ and there are signs this action is welcome: public polling of Virginians now shows majority support for the mini-DOMA's repeal²⁶⁰ while the state's attorney general refused to defend the mini-DOMA in the federal case.²⁶¹ In the most recent survey by Montana State University-Billings, a plurality of

²⁵⁷ Order on Agreement at 2, *Walsh v. Hughes*, No. DR-2011-500192.04 (Ala. Cir. Ct. Mobile Cnty. July 30, 2013).

²⁵⁸ 347 U.S. 483, 495 (1954).

²⁵⁹ *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); see also Brock Vergakis, *In Southern First, Gay Marriage Ban Nixed*, DAILY TIMES (Salisbury, Md.), Feb. 15, 2014, at 4 (reviewing the decision and noting that the order has been stayed during appeal).

²⁶⁰ See Ben Pershing, Scott Clement & Errin Whack, *A Changing Va. Challenges GOP*, WASH. POST, May 16, 2013, at B01 (reporting that repeal is now supported at virtually the same level as the amendment itself was initially supported, a "clear reversal").

²⁶¹ Notice of Change in Legal Position by Defendant Janet M. Raney at 1, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. filed Jan. 23, 2014).

Montanans supported same-sex-marriage,²⁶² the first poll ever to record such a result.²⁶³ Though Alabama's public remains unconvinced,²⁶⁴ the state's courts display an increasing willingness to consider—and even endorse—the parental rights of LGBT parents. As such local courts award more and more gay parents true custody rights over their children, local communities have ever increasing opportunities to watch those parents raise productive members of society. As the awareness of same-sex couples as protectors and nurturers of the next generation grows, so may public tolerance, then public appreciation, and at last public embrace of LGBT marriage. To return to the Justice Brandeis epigraph: there may come a day when allowing full marital status to same-sex couples will not be seen as a radical social experiment. Denying it to them will.

²⁶² CRAIG WILSON ET AL., MONT. ST. U. BILLINGS, THE MSU-BILLINGS POLL: NATIONAL, STATE AND LOCAL ISSUES 15 (2013), available at http://www.msubillings.edu/urelations/releases/2013/2013_State_Poll.pdf.

²⁶³ Katharine MacKnight, *MSUB Poll Surprising Results*, KULR8.COM (Nov. 7, 2013), <http://www.kulr8.com/story/23784464/msub-poll-surprising-results>.

²⁶⁴ See *supra* note 192 (showing Alabama ranking in the bottom three U.S. states for level of same-sex-marriage support).